No. 02-583

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MATTHEW R. LIMON,

Petitioner,

—v.—

KANSAS,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE COURT OF APPEALS OF THE STATE OF KANSAS

REPLY TO BRIEF IN OPPOSITION

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Petitioner's arguments for granting *certiorari* in this case are detailed in the Petition. Petitioner submits this reply solely to address Respondent's contention that the Eighth Amendment challenge is not properly before the Court.

As Petitioner briefly explained in his Petition, Pet. 7 n.10, the Eighth Amendment challenge was preserved in the Kansas courts. Petitioner argued both in a written motion and at oral argument before the Kansas District Court that imposing the presumptive sentence under the criminal sodomy law would violate the Eighth Amendment. App. 16a. The District Court denied Petitioner's motion without commenting on the Eighth Amendment challenge and sentenced him to seventeen years in prison. App. 16a-17a.

Petitioner was statutorily precluded from raising his Eighth Amendment claim before the Kansas Court of Appeals. Kansas law provides that "[o]n appeal from a judgment or conviction entered for a felony committed on or after July 1, 1993, the appellate court shall not review: . . . Any sentence that is within the presumptive sentence for the crime." Kan. Stat. Ann. § 21-4721.

The Kansas Supreme Court and Courts of Appeals have held that § 21-4721 deprives Kansas appellate courts of jurisdiction to consider an Eighth Amendment challenge on direct appeal to any sentence within the presumptive statutory guidelines. *See, e.g.*, *State v. Clemons*, 45 P.3d 384, 395 (Kan. 2002) ("The right to appeal is entirely statutory, and pursuant to K.S.A. 21-4721(c)(1), we have no jurisdiction to hear Clemons' appeal on this [Eighth Amendment] issue."); *State v. Lewis*, 998 P.2d 1141 (Kan. App.), *rev. denied* 269 Kan. 938 (Kan. 2000); *State v. Long*, 993 P.2d 1237 (Kan. App. 1999). As a result, the Kansas District Court was the highest state court authorized to consider Petitioner's Eighth Amendment challenge.

28 U.S.C. § 1257(a) provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . ." When a state creates a procedural or jurisdictional prohibition that prevents appeal of a claim within the state court system, the trial court constitutes the highest court for purposes of § 1257. *See Largent v. Texas*, 318 U.S. 418, 422 (1943); *Costarelli v. Massachusetts*, 421 U.S. 193, 198-99 (1975); *see also Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 237 n.1 (1967). Petitioner asserted his Eighth Amendment claim in the Kansas District Court – the highest state court authorized to consider the claim. As a result, Petitioner's Eighth Amendment claim is properly before the Court.[1]

As Justice Powell said in his concurrence in *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986), "[t]he Georgia statute . . . authorizes a court to imprison a person for up to 20 years for a single private, consensual act of sodomy. In my view, a prison sentence for such conduct – certainly a sentence of long duration – would create a serious Eighth Amendment issue." The Court should grant *certiorari* on the Eighth

[1] Contrary to Respondent's assertion, and contrary to the erroneous statement of the Court of Appeals, App. 14a, Petitioner did raise his Eighth Amendment claim in the appellate court, albeit in reply. He did so in an abundance of caution because, at that time, only the Kansas Court of Appeals had ruled on the jurisdictional question. The Kansas Supreme Court subsequently confirmed the scope of the jurisdictional bar. *See Clemons*, 45 P.3d at 395.

Amendment question in addition to the other Questions Presented in this case.

Respectfully submitted,

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